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No. 131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL.
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From The United States District Court
For The District of Vermont

OPPOSITION TO MOTIONS TO AFFIRM

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APPEAL OR CERTIORARI

Appellants' Jurisdictional Statement points out (pp. 8-10) that the difference between an appeal and a petition for a writ of certiorari has fundamental substantive consequences. The summary affirmance of a judgment on appeal is a decision that it is right. In contrast, the denial of a writ of certiorari is only a decision not to consider whether a judgment is either right or wrong. The Motion To Affirm of National

Small-Shipments Traffic Conference, Inc., et al., would have the Court ignore this difference.[1] Their theory is that the tests for the grant or denial of certiorari are the same as the tests for the grant or denial of a motion to affirm, and that this Court therefore need not concern itself with the "processes of thought that motivated appellants to apply to this Court by direct appeal rather than by petition for writ of certiorari." (Motion To Affirm, p. 24).

This assumption that Appellants had a choice between appeal and certiorari is of course false. The only method the Congress has provided for the review of final judgments of United States District Courts of three judges is by direct appeal to this Court. 28 U.S.C. § 1253. Nor are the considerations in determining whether or not to grant certiorari the same as those in determining whether or not to grant a motion to affirm. The basic consideration in granting or denying certiorari is whether there are "special and important reasons" for review by this Court. Rule 19. This is not a consideration at all in granting or denying a motion to affirm. The Congress, in providing for appeals in this class of cases, has already determined that there are "special and important" reasons for review by this Court. Hence the only consideration in granting or denying a motion to affirm is the merits of the case. Thus, as was said in the very case Traffic Conferences cite, *Ohio ex rel Eaton* v. *Price*, 360 U.S. 246, 247 (1959), which they mis-style *Eion* v. *Price*: "Votes to affirm summarily, . . . it hardly needs comment, are votes on the merits of a case, . . ." Appellants

[1] These Intervening Appellees will be hereinafter referred to as "Traffic Confesences." The only other Intervening Appellee in this Court, Lynchburg Traffic Bureau, will be referred to as "Lynchburg."

reiterate what they said in their Jurisdictional Statement and will further show here, that the question whether the order of the Interstate Commerce Commission and the judgment of the District Court sustaining it are right is substantial.

THE ISSUES AND THE COMMISSION'S RESOLUTION OF THEM

All parties and the District Court agree that Section 216(d) of the Interstate Commerce Act, 49 U.S.C. § 316(d), requires Appellants' rates to meet two separate and distinct criteria, first the criterion of justness and reasonableness, and second the criterion of absence of discrimination, preference or prejudice. All parties and the District Court agree that the Commission found Appellants' rates in issue unlawful solely because it found that they did not meet the first criterion. All parties and the District Court agree that that finding rests on one fact alone, namely, that Appellants' rates in issue are higher for shorter distances than other rates not in issue are for longer distances. The sole question here is whether, on this record, that fact supports that finding.

Traffic Conferences' contention in their Motion To Affirm (pp. 12-14) that Appellants misconceive the Commission's findings is unfounded. The specific issues joined by the evidence were succinctly stated by the Conferences themselves in their brief to the Examiner as follows:

> "(1) the genuiness of the carriers' asserted need for added revenues of 50 to 77 million dollars per annum; (2) the method employed by the respondents to fill their assumed need, specifically the propriety and lawfulness of a method that places virtually the total burden of this added revenue

requirement upon traffic in the lower weight categories; (3) consequential effects on the rate structure of the respondents, with respect to (a) classification relationships, (b) undue prejudice and preference, (c) marketing and economic derangements."

On "the genuiness of the carriers' asserted need for added revenues" the Commission found that their increased rates would produce a ratio of expenses to revenues of 95.6 per cent. (Jurisdictional Statement, p. 20a). Therefore, in accord with its findings "in numerous motor carrier general increase cases" that an operating ratio of 93 per cent is reasonable, it found that Appellants' need for the revenues their increased rates would produce was established. (Jurisdictional Statement, p. 27a).

On the "method employed by the respondents" to fill their need for added revenues and the "consequential effects" thereof, the attack of Traffic Conferences was two-pronged. Their first prong was directed at *all* of Appellants' increased rates on shipments under 6,000 pounds. They said that the imposition of flat increases required those shipments to bear an excessive proportion of the burden of filling the need for added revenues. They argued that those flat increases were "unjust, unreasonable and exhorbitant," that they accentuated an already existing distortion of classification relationships, and that they resulted in "a deranged motor carrier rate structure which fails properly to reflect the relationship of articles of different kinds and which inexcusably interferes with the competitive relations of articles of the same kind." The Commission rejected this attack. In accord with its decision in *General Increases,*

Eastern Central Territory, 316 I.C.C. 467 (1962), it found that flat increases are not inherently unlawful despite the consequent distortion of classification relationships and further found that: "Considering the respondents' cost estimates, which are acceptable as fair approximations, we find that the flat increases on shipments of less than 6,000 pounds do not result in rates which exceed reasonable maxima." (Jurisdictional Statement, p. 28a).

The second prong of Traffic Conferences' attack on the flat increases on shipments under 6,000 pounds was directed only at the rates at issue here. They said that "rates higher for short than for long hauls" are *prima facie* unreasonable, and that the "situation as to undue prejudice is even more serious." Relying on the testimony of five witnesses, they asked that the rates in issue here be found unduly prejudicial to shippers in Middle Atlantic Territory and unduly preferential to their competitors in adjacent territories. Notwithstanding its findings that flat increases are not inherently unlawful and that those of Appellants "do not result in rates which exceed reasonable maxima," and notwithstanding its failure to make the requested findings of undue preference and prejudice, the Commission found that the resulting higher rates to border points in Middle Atlantic Territory than to points beyond in adjacent territories "obviously, in accord with prior decisions of the Commission, . . . would be unlawful," that if a carrier chooses to participate in the rates to points beyond it should arrange to maintain no higher rate at intermediate points, and that to the extent "that such maladjustments occur, the increased rates are unjust and unreasonable." (Jurisdictional Statement, p. 28a).

One searches in vain for a basis sound in law and adequate on the record to support these findings. The Commission's statement that higher rates for longer than for shorter hauls are "obviously unlawful" is obviously erroneous. The Commission has approved such rates by granting countless applications for relief from the long and short haul clause of Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4. Equally erroneous is the statement that a motor carrier who chooses to participate in rates to points beyond Middle Atlantic Territory must arrange to maintain no higher rates to points within the Territory. As we discussed in our Jurisdictional Statement (pp. 19-21), Section 4 has no application to motor carriers. Their only duty respecting their rates is to make them just and reasonable and to avoid unjust discrimination or undue prejudice or preference. These erroneous statements cannot support the ultimate finding that the rates in issue here "are unjust and unreasonable" in the face of the specific finding that those rates do not "exceed reasonable maxima."

THE PRESUMPTION OF UNREASONABLENESS

Appellees apparently recognize that the record will not support the Commission's affirmative finding that the rates in issue are unjust and unreasonable, for they seek to transform it into a finding that Appellants failed to carry their burden of proof.[2] Appellees rely

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[2] Throughout their Motions To Affirm Appellees speak of the Commission's disapproval of the rates "as not shown to be just and reasonable." (E.g., Government's Motion, p. 2). But, as we've seen, the Commission did not find merely that Appellants had failed to show their rates to be just and reasonable, but rather that the rates were unjust and unreasonable. Moreover, its ultimate conclusion, as corrected by its order of February 4, 1964, was not that the rates in issue had not been shown lawful but that they were unlawful.

altogether on a presumption that higher rates for shorter distances than for longer distances are unreasonable. This is not enough. The presumption does no more than place upon Appellants the burden of proof, a burden imposed upon them in any event by Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g).

The fact that gives rise to the presumption, i.e., the fact that rates for shorter distances are higher than rates for longer distances, is not in itself probative evidence that the former are above the zone of reasonableness. This is clear from *Fifth Class Rates Between Boston, Mass. and Providence, R. I.*, 2 M.C.C. 530, 546 (1937), cited at Page 5 of the Government's Motion To Affirm as an example of the Commission's use of the presumption. In that case the Commission invoked the presumption, not to order cancelled higher rates for shorter distances, but rather to order cancelled lower rates for longer distances. Furthermore, as Appellants discuss in their Jurisdictional Statement (pp. 11-12) and Appellees concede, the presumption of unreasonableness is rebuttable. It was rebutted here by Appellants' showing and the Commission's finding that their rates do not "exceed reasonable maxima." *Patterson* v. *Louisville & Nashville R.*, 2 F. 2d 592, 593 (5th Cir. 1924); *Maggioni & Co.* v. *Atlantic Coast Line R.*, 272 I.C.C. 127 (1948).

Traffic Conferences belittle the *Patterson* Case because this Court affirmed it on another ground and therefore had no occasion to pass upon the holding of the Court of Appeals that the presumption of unreasonableness was rebutted. 269 U.S. 1 (1926). (Motion To Affirm, p. 18). But this in no way detracts from the soundness of the holding, or of the Commission's subsequent holding in the *Maggioni* Case. Traffic Conferences seek to distinguish the *Maggioni* Case on the

ground that, since the Commission had prescribed rates higher than those there alleged to be unreasonable, *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932), precluded it from awarding reparations. This, they say, "is manifestly what the Commission meant in *Maggioni* when it spoke of 'a basis recognized as a reasonable maximum by this Commission.'" (Motion To Affirm, p. 19). There is nothing in the Commission's decision to support this proposition. Furthermore, it ignores the fact that in *Maggioni* the Commission not only denied reparations, but also refused to find the rates challenged unreasonable for the future, a finding that the *Arizona* Case did not preclude.

The Government also seeks to distinguish *Maggioni* on the ground that the rates the Commission recognized as reasonable maxima had been prescribed by it. In its view that prescription gave the finding on which it was based some special weight. (Motion, p. 5, fn. 5). This is untenable. It is obviously the finding that rebuts the presumption, not the nature of the order that implements the finding. Hence, the Commission held there that the presumption that higher rates for shorter hauls are unreasonable was rebutted by its finding that those rates did not exceed reasonable maxima. So here, the presumption is rebutted by its finding that Appellants' rates do not exceed reasonable maxima. Of a piece with this untenable argument is the further attempt to distinguish both *Maggioni* and *Patterson* on the ground that the standards of proof are "far stricter" in reparations cases. Assuming *arguendo* that this be true, the fact remains that on this record the Commission specifically found that Appellants' rates do not exceed reasonable maxima.

APPELLEES' FAILURE TO MEET THE ISSUE

Traffic Conferences' Motion To Affirm, like the opinion of the District Court, fails to come to grips with the issue here. It dwells on the power of the Commission in general revenue cases such as this one. It points out that in such cases the Commission may not only fix a just and reasonable general level of rates, but may also compel adjustments to make particular rates just and reasonable.[8] Appellants do not quarrel with this proposition. However, the question here is not the power of the Commission to order particular rates adjusted, but whether its order requiring particular adjustments finds support in the law and on the record. It cannot be gainsaid that the Commission's order compels adjustments in rates it found just and reasonable solely because of their relationship to other rates not in issue. This is the fatal error the Commission committed. As we discussed in our Jurisdictional Statement, rates that are in themselves just and reasonable cannot be condemned because of their relationship to other rates without a finding of unlawful preference, prejudice or discrimination. This is the teaching of this Court in both *State of New York* v. *United*

[8] Traffic Conferences argue (Motion to Affirm, p. 17) that, while Appellants may have satisfied the requirement that their rates be reasonable, they did not satisfy the requirement that they be just. The short answer is that the Commission did not differentiate between just rates and reasonable rates. And it rejected Traffic Conferences' vigorous argument that Appellants' flat increases on shipments under 6,000 pounds required those shipments to bear a disproportionate share of the burden of meeting Appellants' need for added revenues; an argument that might be said to go to the justness rather than the reasonableness of the increases under investigation. Contrary to Traffic Conferences' contention, the rejection of this argument necessarily constituted a finding that the rates under investigation were properly related to one another.

States, 331 U.S. 284 (1947) and *United States* v. *Chicago M. St. P. & P. R. Co.*, 294 U.S. 499 (1935)[4]

DISCRIMINATION THE IMPROPER BASIS OF THE COMMISSION'S ORDER

What the Commission has attempted here is nothing more nor less than to eradicate discrimination without first determining whether the discrimination is unlawful. This is perfectly clear from the Government's Motion To Affirm. Its whole argument in support of the Commission's order relies on its power to eliminate discrimination. Thus it points out that Section 4 of the Act forbids railroads to establish high rates for shorter hauls than for longer hauls without specific permission from the Commission because "this is a type of discrimination so patent as to warrant specific condemnation." (Motion To Affirm, p. 4). It says that in this case the Commission properly treated "this type of apparent discrimination as requiring justification," and that "appellants were on notice . . . that they would bear a special burden in connection with those aspects of its (sic) proposed rates which would result in lesser charges for longer than for shorter hauls." (Motion To Affirm, p. 5).

The "special burden" to which the Government refers could only be to justify the disparities between the intraterritorial rates in issue and the interterritorial rates not in issue. True enough, the Commission in

[4] Traffic Conferences say that the *New York* and *Chicago* Cases are inapposite because they were rate rather than revenue cases. (Motion To Affirm, pp. 9-10). At the same time they say that the differences between rate and revenue cases are largely those of emphasis. Be this as it may, both cases make plain that the question of the propriety of rate relationships sound in discrimination, not in justness and reasonableness.

two prior proceedings on rate increases in Middle Atlantic Territory admonished the carriers to correct such disparities. But this fact has no bearing on the issue here, which is whether its finding that just and reasonable rates are unlawful because of those disparities is supported by the record. That its finding is not so supported is clear from the *Chicago* Case, *supra*. As this Court there held, before the Commission can do what its order here does, i.e., compel the maintenance of a particular rate relationship, it must undertake "a comprehensive inquiry into [all of] the rates of all of the lines within the area of controversy" in which it can "fix the fair relation . . . and build the structure of the rates accordingly."[5]

Further demonstrating that the criterion of justness and reasonableness was misapplied here in an attempt to eradicate discrimination is the argument of Traffic Conferences at Page 7 of their Motion To Affirm. They say that the self-evident finding that Appellants have control of their individual rates and therefore are able to eliminate disparities "is a determination that the presumption of unreasonableness has not been rebutted." This is not so. The power of a carrier to control its rates obviously has no relevance on the issue of their reasonableness. However, it is well settled that a rate cannot be found discriminatory except in a proceeding in which all of the carriers participating in it are party.

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[5] The Commission having refused to undertake such an inquiry, Appellant Middle Atlantic Conference has instituted one by filing a formal complaint against the carriers, some 1800, participating in the lower interterritorial rates: *Middle Atlantic Conference* v. *A.A.A. Motor Lines, Inc., et al.*, I.C.C. Docket No. 34401, Complaint filed February 24, 1964.

CONCLUSION

The disparities in rates to which the Commission's order is addressed are neither isolated nor peculiar to Middle Atlantic Territory. There are nine separate motor carrier rate making territories in the United States. There are many disparities between the intra-territorial rates within each of those territories and the interterritorial rates to and from each. As Appellants demonstrated on this record, the problem such disparities present cannot be solved in the way that the Commission would solve it here, i.e., by ordering every individual carrier to adjust its rates, for this would make impossible the maintenance of just, reasonable, stable and practical rate structures.[6] It can only be solved in the way that it was solved by the railroads, i.e., by complementary mutual adjustments in the rate structures of each group of carriers. This is not easily accomplished and cannot be accomplished at all except through the Commission's exercise of its regulatory authority, as its experience in the case of the railroads makes plain. See *State of New York* v. *U. S.*, supra.

However, the difficulty of the task does not justify what the Commission seeks to do here, and, will no doubt seek to do elsewhere if its order is sustained: What it seeks to do here is substitute administrative fiat for findings of fact supported by substantial evidence and conclusions of law correctly applying the

[6] The practical difficulties resulting from the attempt to solve the problem in the way the Commission directed is illustrated by the tariffs filed in compliance with its order. One who ships only from Pittsburgh, Pa. to Richmond, Va., both points within Middle Atlantic Territory, must now examine the tariffs of Middle Atlantic Conference, Southern Motor Carriers Rate Conference and Eastern Central Motor Carriers Association in order to ascertain the applicable rates.

criteria that define and limit its regulatory authority. Regulation by fiat is of course less troublesome than developing a record that will permit adequate findings of fact and the application of correct criteria to them. Nevertheless, this is what the law requires, administrative inconvenience notwithstanding.

Respectfully,

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